No. 99-5746
A. 99A151

(5)

IN THE
SUPREME COURT OF THE UNITED STATES

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 25 1999
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
September 1, 1999

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6 pp

The Director's arguments are, for the most part, either refuted in Weeks' petition for a writ of certiorari or refuted by principles of logic that this Court undoubtedly can apply without assistance from the petitioner.[1] Weeks therefore limits this reply to an issue that the Director has newly injected into the Brief in Opposition: whether, if Weeks is correct about the meaning of *Ake*, he could have made a sufficient showing of need to support his pretrial motion for nonpsychiatric experts, such that the error in denying the expert assistance was not harmless.

No court has held that Weeks did not make an adequate showing of need. The trial court rejected Weeks' request for funding on the ground that pathology and firearms issues are ones on which experts could not differ, not on the ground that Weeks made an insufficient showing of need. (R. at 641- 43.) *That* decision by the trial court, and not some supposed deficiency in Weeks' pretrial motion, underlies Weeks' constitutional claim. On direct appeal, the state court rejected Weeks' claim without addressing the substance of the issue presented. (Appendix ("App.") at 80.) The district court and the court of appeals decided that Weeks' constitutional claim was barred as a threshold matter of law by the new rule doctrine. (App. at 51, 71.) None of these courts held, in the alternative, that Weeks did not make an adequate showing of need.

The premise of *Ake*, and a component of its substantive constitutional rule, is that the defendant needs an expert to meet the state's case. By pointing to the state's version of the facts — a version that Weeks was unable to rebut without independent nonpsychiatric experts — the Director merely shows that denying Weeks access to the nonpsychiatric experts handicapped Weeks' defense and effectively prevented Weeks from countering the state's case at trial.

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[1]For example, the Director suggests that the *Teague* issue should be resolved in a direct appeal case. Obviously, *Teague* issues arise only in collateral proceedings.

Weeks raised numerous significant and specific questions related to premeditation and aggravated battery in his pretrial request for expert assistance; answers to those questions either had not been ascertained by the state's forensic experts, or the conclusions of the state's experts appeared to contradict other evidence. (R. at 151-53; 155-156) If Weeks had been afforded an independent pathologist and firearms expert, he would have shown that, in stark contrast to *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987), the shooting was not a close-up, execution-style killing and was the product of a panicked, impulsive shooting along the length of a motor vehicle. He also would have shown that the "pull" on the gun was so light that a panicked individual could unintentionally fire multiple shots when he intended, at most, to fire only once. *See Barnes v. Commonwealth*, 360 S.E.2d 196, 203 (Va. 1987) (multiple gunshot wounds do not constitute aggravated battery if death is instantaneous and there is not an appreciable lapse of time between shots fired). This evidence, if believed by the jurors, would have affected their decision on guilt and/or sentence.

CONCLUSION

The Court should grant a writ of certiorari on each of Weeks' questions presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE OF REPLY BRIEF

I hereby certify that I am a member of the Bar of this Court and that on August 25, 1999, pursuant to Rule 29.3 of the Rules of United States Supreme Court, I caused a copy of the Reply Brief to be served by facsimile and regular mail on Robert Anderson, Esq., Assistant Attorney General, 900 E. Main Street, Richmond, VA 23219.

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August 25, 1999

VIA TELECOPIER/FEDERAL EXPRESS

Mr. Chris Vasil
c/o Clerk's Office
United States Supreme Court
One 1st Street, N.E.
Washington, DC 20543

Re: Lonnie Weeks, Jr. v. Ronald Angelone, Director,
Virginia Department of Corrections
No. 99-5746
Scheduled Execution Date: September 1, 1999

Dear Mr. Vasil:

Enclosed please find Petitioner's Reply in Support of Petition for a Writ of Certiorari and Application for a Stay of Execution, which we ask that you please file in the referenced matter. We will send you the original by Federal Express.

If you should have any questions, please do not hesitate to contact us.

Very truly yours,

HUFF, POOLE & MAHONEY, P.C.

By
Timothy M. Richardson

TMR:vaw
Enclosure
cc w/encl: Robert H. Anderson, III (Via Telecopier)

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